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The Discriminatory Use of the "*KGB* Procedure" by Police Against Women in Canada

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ABSTRACT

In *R. v. B. (K.G.) (KGB)*, the Supreme Court identified the procedural criteria necessary to ensure sufficient reliability of certain types of witnesses' police statements, such that they can be introduced for the truth of their contents. The criteria include that the statement be videotaped, taken under oath, and that the witness be cautioned regarding the severe penal sanctions they could face if they lie. The type of witnesses contemplated are accomplices, coaccused, or others whose character makes them presumptively untrustworthy, and whose statement may become necessary because of the likelihood that they will recant at trial. The Court did not intend for *KGB* to be used generally, and the police do not typically impose this protocol on people who report crimes. Indeed, there are two types of witnesses subjected to *KGB* when they give statements to the

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police: those the Court intended (criminally implicated, coaccused or presumptively untrustworthy witnesses) and women who allege sexual or gender-based violence. A close examination of case law, the rules of evidence, and Crown prosecution standards reveal that imposing this protocol on women who allege sexual and other gender-based violence is, in the vast majority of cases, pointless, rooted in discriminatory assumptions about women and rape, and likely to impose unnecessary harms on those who turn to the criminal justice system to respond to experiences of sexualized violence.

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RÉSUMÉ

Dans l'affaire *R. c. B. (K.G.) (KGB)*, la Cour suprême a identifié les critères procéduraux nécessaires pour garantir la fiabilité de certains types de déclarations de témoins aux policiers, de sorte qu'elles puissent être présentées pour la véracité de leur contenu. Ces critères prévoient que la déclaration soit enregistrée intégralement sur bande vidéo, qu'elle soit faite sous serment et que le témoin soit averti des sanctions pénales sévères qu'il pourrait encourir s'il mentait. Les témoins visés ici sont les complices, les coaccusés ou d'autres personnes dont le caractère les rend indignes de foi et dont la déclaration pourrait s'avérer nécessaire en raison de la probabilité qu'ils se récusent au cours du procès. La Cour ne souhaitait pas que les critères *KGB* soient utilisés de manière généralisée, et la police n'impose habituellement pas ce protocole aux personnes qui signalent des crimes. En effet, il existe deux types de témoins soumis au protocole *KGB* lorsqu'ils font des déclarations à la police. Ce sont les personnes visées par la Cour (les personnes impliquées pénalement, les coaccusés ou les témoins indignes de foi) et les femmes qui allèguent des violences fondées sur le sexe. Un examen approfondi de la jurisprudence, des règles de preuve et des normes de poursuite de la Couronne révèle que l'imposition de ce protocole aux femmes qui allèguent des violences sexuelles et autres violences fondées sur le genre se révèle, dans la grande majorité des cas, inutile. Cette mesure s'appuie sur des prémisses discriminatoires relatives aux femmes et au viol, et risque de porter préjudice inutilement aux personnes qui se réfèrent au système de justice pénale pour faire face à des expériences de violence sexualisée.

INTRODUCTION

IMAGINE summoning up the nerve to breach the entrance of a police station and asking to speak to someone about the sexual assault(s) you have experienced—or attending an appointment with the police to give a statement after you have spent the night at the hospital, waiting for a sexual assault nurse examiner (SANE) and then enduring a lengthy and intrusive physical exam. Now contemplate how you might be impacted if, before being interviewed, you are threatened by the police about the criminal charges you could face if you mislead them or recant.

The following account, which is taken directly from an interview in 2020 with an Indigenous woman who alleged one incident of sexual assault against a friend, illustrates how the experience can unfold: she was placed in a small, sterile interview room with a video camera visible in one corner of the ceiling, where she waited by herself.[1] After several minutes, two uniformed Royal Canadian Mounted Police (RCMP) officers, wearing firearms, boots, and hats, entered the room. One sat at a small table with her while the other stood in the corner, in his bulletproof vest, with a clipboard, and read from it:

> You must understand that it is a criminal offence under section 139 and 140 of the *Criminal Code* to obstruct justice or commit public mischief by making false statements to the police during an investigation. So what that means is that those sections of the *Criminal Code,* if the information you provide we find to be false or given with a malice like an ill intent you may be punished or liable under those sections of the *Criminal Code* okay? You must further understand that you may be a witness at a trial concerning the events you describe in the statement. And if at the time you recant your statement or claim it is false it can and will be used at that trial and you may be liable under section 140 of the *Criminal Code* for fabricating evidence. A conviction for

1 This case is part of a sample of 304 cases in Nova Scotia, closed between 2020 and 2023. The sample of cases forms part of a larger research project examining prosecution files in sexual offence cases conducted in partnership with the Nova Scotia Public Prosecution Service (see Case #001 (2020–2023), Nova Scotia (Evidence, Interview with Complainant)). Given the strict confidentiality agreement(s) associated with this project, additional identifying or source information cannot be provided.

> an offence under 139, 140, and 137 could result in a term of imprisonment. So what that means is if there is enough evidence that we lay a charge and this goes to trial and at that time you recant or you say what I gave to the police was false you may be liable under those sections of the *Criminal Code* for possible charges. Do you understand the criminal consequences of making a false statement?[2]

Upon answering in the affirmative, the officer with the clipboard left the room, returning with a Commissioner of Oaths, who required the complainant to raise her right hand and "swear to tell the truth, the whole truth, and nothing but the truth."[3]

In some instances, when this caution is given to sexual assault complainants before an interview is conducted, they are warned about the specific punishments they will be liable for if they lie to the police. The woman in the next example, who alleged that she awoke to find her roommate penetrating her vagina with his penis, was also cautioned by the RCMP before reporting her sexual assault to them:

> I must tell you that if what you tell me is not true you may be charged with fabricating evidence, perjury, obstructing justice or public mischief. Fabricating evidence, section 137 of the *Criminal Code* is when a person intending to mislead, makes up, or fabricates anything intending it to be used as evidence in court at any time. Being convicted of this crime carries a penalty of up to 14 years in jail. Perjury, section 131 of the *Criminal Code*, takes place anytime a person solemnly swears or declares under oath to a person empowered to administer oaths a false statement that the person intends to be misleading while knowing the statement is false, whether or not it is done in a court before a judge. Being convicted of this crime carries a penalty of up to 14 years in jail. Obstructing justice, section 139 of the *Criminal Code* happens when a person deliberately attempts to obstruct, pervert or defeat the course of justice ... Being convicted of this

2 *Ibid.*

3 *Ibid.*

> crime carries a penalty of up to ten years ... Do you understand the criminal consequences of making a false statement?[4]

The maximum term of imprisonment in Canada for someone convicted of sexual assault against another adult is either eighteen months (if prosecuted summarily) or ten years (if the prosecution proceeded by way of indictment)[5]—penalties that are substantially less severe than several of the ones some sexual assault complainants in Canada are threatened with when they report their experiences of sexualized violence.[6]

This is not how people who report crimes to the police are usually treated. This process of threatening a witness with severe penal sanctions if they lie and requiring them to solemnly affirm or place their hand on a holy book and swear an oath to tell the truth before being interviewed by the police is called a "*KGB* statement."[7] It was developed to deal with the substantive admissibility of prior inconsistent statements to police by coaccused, accomplices, or other witnesses whose "character suggests such precautions would be advisable."[8]

A review of all reported cases in Canada in the past five years in which courts make reference to a "*KGB* statement" reveals a pattern that is as unmistakable as it is troubling. There are two categories of witnesses that may be met with this procedure when interviewed by the police in Canada: First, those the police have reason to be suspicious of because they are implicated in the offence being investigated, have a history of fabricating evidence, or are criminally involved with the accused. This is the category of witnesses for whom the *KGB* procedure was originally intended. The second category comprises women who allege sexual violence, intimate partner violence, or other gender-based violence.

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4 Case #002 (2020–2023), Nova Scotia (Evidence, Interview between Complainant and RCMP Officer) [Case #002].

5 *Criminal Code*, RSC 1985, c C-46, s 271. The vast majority of sexual assault charges are under section 271, rather than the more serious sections 272 and 273 of the *Criminal Code*. Even the maximum penalty under section 272, if perpetrated against an adult, is fourteen years. This is the same penalty as fabricating evidence and perjury.

6 *Ibid*, ss 131, 139.

7 *R v B (KG)*, [1993] 1 SCR 740, 1993 CanLII 116 (SCC) [*KGB*].

8 *Ibid* at 791, 793.

Courts reference *KGB* statements from complainants in cases involving sexual or gender-based violence roughly as often as they do in cases in which the statement was taken from an accomplice or coaccused in a murder or other serious non-sexual offence.[9] This is not to suggest that all, or even most, sexual assault complainants are subjected to the *KGB* procedure. We do not know the frequency with which this occurs, and I am not claiming it is routine. But we do know that, in addition to criminally implicated and presumptively untrustworthy witnesses, women who allege sexual violence or other gender-based violence appear to be the only other group of witnesses confronted with this approach by the police.[10] The police do not seem to impose this protocol on people who report experiences of robbery, fraud, or car theft—or even other witnesses who provide the police with evidence in sexual assault

9 A May 2024 search of CanLII, WestLaw Canada, and Lexis+ Canada using the search term "*KGB* statement" for the years 2019 to 2024 yielded 117 decisions. Of these, 3 cases were excluded from this sample for relevance (they included a passage from another case that made reference to a *KGB* statement in a different case) and 2 did not have sufficient information about either the declarant or the case. In 43 of these 117 cases, the declarant was a woman complainant in a case involving sexual assault, intimate partner violence including sexual assault, or intimate partner violence/other gender-based violence without sexual assault. Nothing in the reported decisions in these cases suggested that these complainants were *KGB*-type witnesses. In 17 cases, the declarant was a complainant in a human trafficking case. Some of these decisions revealed declarant backgrounds that would warrant the *KGB* procedure (or parts of it), while others did not. In 47 cases, the declarant was a *KGB*-type witness in a homicide, robbery, or serious drug-trafficking case. This is an imperfect method for gathering information about police practices regarding the use of the *KGB* procedure. While many of these decisions discuss whether, or which, aspects of the *KGB* protocol were employed (the oath, caution, and/or videotape), many do not. In addition, there are some reported decisions in which it is clear the *KGB* protocol was used but the decision does not refer to *KGB* (see e.g. *R v Wentworth*, 2022 ONSC 5319 at paras 36–42 [*Wentworth*]). While not perfect, my method is nevertheless defensible. If the *KGB* protocol was being used by police in other types of interviews, or for witnesses generally, this undeniable pattern in the reported decisions referencing "*KGB* statements" would not exist. One would expect to find the term referenced in reported decisions involving other types of offences—and that is simply not the case.

10 Of the 117 cases, there were only 5 cases that did not precisely fit this pattern. Moreover, in these 5 cases, the declarant was a family member of the accused and an eyewitness to the offence (a homicide in 3 of the cases and a severe assault in 1 case). Arguably, the witnesses in these cases likely do have a heightened risk of dishonesty because of their relationships with the accused.

investigations in which the alleged victims of the offence *are* subjected to this procedure.[11]

In most sexual assault cases, there is no justification for imposing this procedure on complainants. As will be explained, in the overwhelming majority of sexual assault cases in which it is used, the procedure serves no purpose at trial. It can, however, cause significant harm.

Consider two of these harms. The first pertains to the remarkably high post-charge attrition rate for sexual offences.[12] In Canada, more than half of sexual assault charges do not proceed to court.[13] This is a substantially higher rate of attrition than the rate of post-charge attrition for other offences.[14] One of the most common reasons for this high rate of attrition involves complainants who, despite having reported, subsequently decide they do not want to proceed.[15] In their study, Professors Mary Anders and Scott Christopher found that while 80% of sexual assault complainants were committed to participating in the prosecution of their assailant at the time they reported to the police, only 44% of the 440 American women in their sample remained cooperative. Indeed, the majority of women in their study did not voluntarily aid the prosecution after reporting their rape to the police.[16] Multiple other studies have yielded similar findings: Sexual assault complainants frequently become unwilling to proceed further in the legal process after they have reported to the police.[17]

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11 See note 9, describing the results of a comprehensive case law search using the term "*KGB* statement." But see *Wentworth*, *supra* note 9 at paras 36–42.

12 Statistics Canada, *From Arrest to Conviction: Court Outcomes of Police-Reported Sexual Assaults in Canada, 2009 to 2014*, by Cristine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, 26 October 2017), online (pdf): <statcan.gc.ca> [perma.cc/A7UE-W6M6].

13 *Ibid* at 3.

14 *Ibid*.

15 See e.g. Lucy Maddox, Deborah Lee & Chris Barker, "Police Empathy and Victim PTSD as Potential Factors in Rape Case Attrition" (2011) 26:2 J Police & Crim Psychology 112 at 112; Mary C Anders & F Scott Christopher, "A Socioecological Model of Rape Survivors' Decisions to Aid in Case Prosecution" (2011) 35:1 Psychology Women Q 92 at 92.

16 Anders & Christopher, *supra* note 15 at 97.

17 See e.g. Patricia A Frazer & Beth Haney, "Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives" (1996) 20:6 L & Human Behavior 607 at

What causes these women to retreat from the criminal justice system? One of the main factors is a lack—or perceived lack—of support from the service providers responsible for receiving, processing, and investigating their reports, particularly the police.[18] Numerous researchers have demonstrated that women who receive, or who perceive that they have received, a lack of support from the police when they report sexual offences interpret this lack of support as disbelief regarding their allegations—an experience that leads them to conclude that their cases cannot be successfully prosecuted.[19] Understandably, this perception causes survivors to withdraw their voluntary participation from the process.[20] Introducing sexual assault survivors to the criminal justice process through a legal procedure that situates them as untrustworthy—and that *is* what threatening them with perjury charges does—is a surefire way to contribute to this attrition pattern.

A second and related harm concerns the re-traumatizing impact that the *KGB* procedure is likely to have on survivors of sexualized violence and other forms of gender-based violence.[21] While most people would presumably find it unnerving, or at a minimum alienating, to be threatened with prison and treated with suspicion when reporting a crime, there are particular harms that arise when this is imposed upon those who

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611; Rebecca Campbell & Sheela Raja, "The Sexual Assault and Secondary Victimization of Female Veterans: Help-Seeking Experiences with Military and Civilian Social Systems" (2005) 29:1 Psychology Women Q 97 at 102. See also *ibid* at 92.

18 Anders & Christopher, *supra* note 15 at 93–95.

19 See e.g. Holly Johnson, "Why Doesn't She Just Report It?: Apprehensions and Contradictions for Women Who Report Sexual Violence to the Police" (2017) 29:1 CJWL 36 at 49–51; Jan Jordan, "Beyond Belief?: Police, Rape and Women's Credibility" (2004) 4:1 Crim Justice 29 at 33; *ibid* at 94; Debra Patterson, "The Linkage Between Secondary Victimization by Law Enforcement and Rape Case Outcomes" (2011) 26:2 J Interpersonal Violence 328 at 337–38. See generally Angie C Kennedy et al, "A Model of Sexually and Physically Victimized Women's Process of Attaining Effective Formal Help Over Time: The Role of Social Location, Context, and Intervention" (2012) 50:1/2 *American J Community Psychology* 217.

20 See Maddox, Lee & Barker, *supra* note 15 at 113; Anders & Christopher, *supra* note 15 at 98; Johnson, *supra* note 19 at 39, citing Megan A Alderden & Sarah E Ullman, "Creating a More Complete Picture: Examining Police and Prosecutor Decision Making When Processing Sexual Assault Cases" (2012) 18:5 Violence Against Women 525.

21 Tejaswinhi Srinivas & Anne P DePrince, "Links Between the Police Response and Women's Psychological Outcomes Following Intimate Partner Violence" (2015) 30:1 Violence & Victims 32 at 43.

have been subjected to sexual and gender-based violence. This is because of the complex relationship between these particular types of violence and the feelings of self-doubt, shame, and self-blame often experienced by its victims.[22] For some survivors, self-blame follows swiftly on the heels of self-doubt and leads just as quickly to the re-victimizing pain of shame and humiliation when they are confronted with legal actors whose introductory approach is one of distrust and disbelief.[23]

A police interview that begins by requiring a sexual assault complainant to provide sworn assurances that she will not lie or mislead is highly likely to trigger feelings of self-doubt. It would do so for anyone—let alone someone who has experienced a form of violence that they have been socialized to understand as something they caused by what they wore that night, how much they drank, how they danced, consensual sex they had on earlier occasions, what they posted on social media, or their decision to attend an apartment, bar, or park alone late at night. Sexual assault survivors are no more immune from rape mythology than are police, lawyers, judges, and perpetrators of sexual assault. A woman in Debra Patterson's study on interactions between police and sexual assault complainants captures this phenomenon well in her description of how she "felt like a criminal, not the victim" because the detective asked her whether she was lying and told her that she could be charged with false reporting.[24] She stated: "He made me feel like I was lying about it, and I wasn't ... I would never report anything ever again, and I would never recommend anybody to [report] ... just so you can get your own feelings hurt even more and make you feel ... worse."[25]

One of the long-standing and major barriers to reporting sexual offences identified by victims is a profound fear that the police will not

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22 See e.g. Angie C Kennedy & Kristen A Prock, "'I Still Feel Like I Am Not Normal': A Review of the Role of Stigma and Stigmatization Among Female Survivors of Child Sexual Abuse, Sexual Assault, and Intimate Partner Violence" (2018) 19:5 Trauma Violence & Abuse 512; Catalina M Arata, "Coping With Rape: The Roles of Prior Sexual Abuse and Attributions of Blame" (1999) 14:1 J Interpersonal Violence 62.

23 Karyn L Freedman, *One Hour in Paris: A True Story of Rape and Recovery* (Calgary: Freehandbooks, 2014) at 77.

24 *Supra* note 19 at 338.

25 *Ibid.*

believe them.[26] Survivors of intimate partner violence report similar hurdles.[27] Researchers have demonstrated the adverse impact on reporting caused by police who treat survivors with presumptive disbelief and skepticism. In a Canadian study that interviewed sexual assault survivors who reported to the police, Holly Johnson found that many of the women who had negative experiences reporting to the police, including some who were threatened with criminal charges if they lied, indicated that because of these experiences, they would not come forward if they were sexually assaulted in the future.[28] In cases in which it serves no purpose, imposing an investigative procedure on complainants that reinforces this fear needlessly fortifies the barriers to reporting and accessing services faced by survivors of sexual assault and intimate partner violence.

The police must stop this practice, and the judiciary, as caretaker of our justice system and architect of this common law protocol, must do much more to renounce and reject this police practice when it is implemented in a discriminatory manner.

The remainder of this article proceeds in three parts. Part I explains why this alienating and potentially re-traumatizing approach to interviewing alleged victims was not intended for, and should not be used in, the overwhelming majority of sexual assault investigations.

Part II interrogates sexual assault case law in which courts make reference to *KGB* statements, dividing it into three categories: (1) cases in which the police had no justification for imposing *KGB* and should have simply videotaped complainants' statements; (2) cases in which it was advisable to videotape a complainant's statement and have her give it under oath or solemn affirmation; and (3) cases in which the police were justified in videotaping, requiring an oath, and issuing a caution to a sexual assault complainant.

Part III considers the role of the courts in perpetuating the discriminatory application of the *KGB* procedure on sexual assault complainants

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26 Lindsay M Orchowski et al, "Barriers to Reporting Sexual Violence: A Qualitative Analysis of #WhyIDidntReport" (2022) 28:14 Violence Against Women 3530 at 3538.

27 See e.g. Marsha E Wolf et al, "Barriers to Seeking Police Help for Intimate Partner Violence" (2003) 18:2 J Family Violence 121 at 125.

28 *Supra* note 19 at 49–51, 55.

and their failure to offer adequate direction to police on the use of the *KGB* protocol.

I. *KGB* PROCEDURE WAS NOT INTENDED FOR THE VAST MAJORITY OF SEXUAL ASSAULT COMPLAINANTS

R. v. B. (K.G.) concerned four young men who were involved in a fight with two other men that resulted in a homicide. Three of the young men gave statements to the police incriminating the fourth as the person who stabbed the victim—statements they then recanted at trial.[29] Given their involvement in the fight, the three men who were implicated in the homicide had an obvious motive to exculpate themselves and incriminate the fourth man in their interviews with the police. Prior to the Supreme Court of Canada's decision in *KGB*, and as a consequence of the general rule against the substantive admissibility of hearsay, a prior inconsistent statement could only be used at trial to impugn the credibility of a witness/declarant if the witness adopted the statement. The Court modified the hearsay rule in *KGB* to permit the Crown to introduce these out-of-court statements for the truth of their contents—the issue of substantive admissibility—in exceptional circumstances, provided certain criteria of threshold reliability were met.[30] These criteria include, in terms of procedural reliability: that the police statement was videorecorded in its entirety, taken under oath or solemn affirmation, after the declarant was given a warning regarding the severe criminal sanctions attached to providing a false statement, and that the opposing party have a full opportunity to cross-examine the declarant on the statement.[31]

A. *The* KGB *Procedure Is Intended to Address the Substantive Admissibility of Prior Inconsistent Statements by Recanting Witnesses*

The *KGB* procedure was specifically designed to address the particular hearsay dangers that arise when a prima facie untrustworthy witness recants at trial from the evidence they provided to the police. Chief Justice Lamer, writing for the majority, was clear that this process was intended to address the heightened reliability concerns that arise when

29 *KGB*, *supra* note 7 at 751.

30 *Ibid* at 742–43.

31 *Ibid.*

considering the substantive admissibility of a prior inconsistent statement in particular:

> The reliability issue is sharpened ... because the trier of fact is asked to choose between two statements from the same witness, as opposed to other forms of hearsay in which only one account from the declarant is tendered ... [A]dditional indicia and guarantees of reliability to those outlined in *Khan* and *Smith* must be secured in order to bring the prior statement to a comparable standard of reliability.[32]

Unlike in *KGB*, the out-of-court statements in both *R. v. Khan* (*Khan*) and *R. v. Smith* (*Smith*) were the only statements available from these witnesses. In *Khan*, the child complainant was deemed not competent to testify due to her age.[33] In *Smith*, the declarant of the hearsay statement was dead.[34]

The assortment of reliability factors is different in cases involving the admissibility of prior inconsistent statements, and the majority in *KGB* was explicit on this point in its reasoning.[35] On the one hand, there are competing statements for the trier of fact to assess; this gave rise to Chief Justice Lamer's suggestion that the reliability of the police statement will be improved if it is given under oath or affirmation so that the trier of fact is not comparing sworn and unsworn evidence.[36] On the other hand, unlike *Khan* and *Smith*, the declarant was available for cross-examination. The additional indicia of procedural reliability called for in *KGB*—the videotape record, the oath, and perhaps most significantly, the warning of severe criminal sanctions for lying or misleading the police—were specific to addressing the substantive admissibility of prior inconsistent statements in particular.

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32 *Ibid* at 786–87.

33 *R v Khan*, [1990] 2 SCR 531 at 536, 1990 CanLII 77 (SCC) [*Khan*].

34 *R v Smith*, [1992] 2 SCR 915, 1992 CanLII 79 (SCC).

35 *KGB*, *supra* note 7 at 742.

36 *Ibid* at 790.

B. *The KGB Protocol Was Intended to Address Witnesses for Whom There Is a Heightened Risk of Dishonesty*

Perhaps most importantly, the *KGB* procedure was designed in contemplation of witnesses who are presumptively less trustworthy because they are implicated in the offence being investigated and, as such, may be motivated to lie to the police, are criminally involved with the accused, have a history of fabricating evidence, or are of "amoral character."[37] The Supreme Court did not intend for the police to generally impose this protocol on people who report their experiences of criminal victimization. With the exception of some, but certainly not all, women who allege sexual violence, intimate partner violence, or who have been trafficked, police do not typically impose this procedure on alleged victims of crime.[38]

In the 117 reported decisions in the last five years in which courts make reference to *KGB* statements, the declarant in nearly every case is either a sexual assault complainant, an alleged victim of intimate partner violence or human trafficking, or if the case pertains to another type of offence: "a witness who cannot be trusted ... due to [their so-called] unsavoury"[39] or "amoral character."[40] Other than coaccused, those with a history of dishonest engagement with the criminal justice system, or otherwise criminally involved witnesses, women who allege sexual and gender-based violence appear to be virtually the only people the police subject to this procedure.[41]

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37 *R v Khela*, 2009 SCC 4 at para 3 [*Khela*].

38 See note 9, which describes the results of a comprehensive case law search using the term "*KGB* statement." In summary, 43 of the 114 cases yielded by this search, the declarant was a woman complainant in a case involving sexual assault, intimate partner violence including sexual assault, or intimate partner violence/other gender-based violence without sexual assault. Nothing in the reported decisions in these cases suggested that these complainants were *KGB*-type witnesses. In 17 cases, the declarant was a complainant in a human trafficking case. Some of these decisions revealed declarant backgrounds that would warrant the *KGB* procedure (or parts of it), while others did not. In 47 of these 114 cases, the declarant was a *KGB*-type witness in a homicide, robbery, or serious drug-trafficking case.

39 *R v Bradshaw*, 2017 SCC 35 at para 5 [*Bradshaw*].

40 *Khela*, *supra* note 37 at para 3.

41 See note 9, referring to the comprehensive case law search I conducted using the term "*KGB* statement."

Recall that *KGB* involved four men involved in a fight with two other men, one of whom was fatally stabbed. The Court intended this protocol for witnesses whose evidence demands additional indicia of trustworthiness. That this was the orientation of the reasoning in *KGB* is revealed by the types of out-of-court statements the majority refers to, including confessions and police interviews with accused individuals and suspects,[42] as well as Chief Justice Lamer's repeated references to false testimony by lying witnesses.[43]

Consider also this passage from his decision: "[O]f course, the police would not resort to this precaution in every case; it may well be reserved for cases such as this, where a major crime such as murder is being investigated, the testimony of the witnesses is important to the Crown's case, *and the character of the witnesses suggests that such precautions would be advisable*."[44]

Again, there are almost no reported decisions in the last five years referencing *KGB* statements from complainants in cases involving other types of offences—absent other indicia making the complainant less trustworthy.[45] Moreover, in other legal contexts where witnesses *do* give evidence under oath or affirmation, they are not first threatened with criminal sanctions if they lie. For instance, unlike a *KGB* caution, when witnesses in court swear an oath to tell the truth before testifying, they are not threatened with prosecution and imprisonment. Similarly, when witnesses provide out-of-court, sworn evidence to a Commissioner of Oaths pursuant to section 709 of the *Criminal Code*, they are not first told that they could be subject to up to fourteen years in prison if they do not tell the truth and then asked if they understand the criminal consequences of making a false statement.[46]

Unlike the approach taken to witnesses at trial, at a preliminary inquiry, or with other sworn out-of-court statements, the *KGB* protocol is premised on the assumption that there is a heightened risk of dishonesty

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42 *KGB*, *supra* note 7 at 756–57, 801.

43 *Ibid* at 790.

44 *Ibid* at 793 [emphasis added].

45 See note 9, referring to the comprehensive case law search I conducted using the term "*KGB* statement."

46 See Case #002, *supra* note 4.

with the witness—and a concomitant increased threat that the witness will lie or later recant. This is why *KGB* cautions are to include a warning that "severe criminal sanctions will accompany the making of a false statement."[47]

The types of witnesses contemplated in *KGB* were also found in *R. v. Youvarajah* (*Youvarajah*)[48] and *R. v. Bradshaw* (*Bradshaw*).[49] In *Youvarajah*, the Supreme Court upheld the trial judge's decision to exclude a coaccused's prior inconsistent statement, in the form of an agreed statement of facts, in a murder trial.[50] The coaccused/declarant recanted at trial, and the trial judge found that he "had a strong incentive to minimize his role in the crime and shift responsibility" to the accused.[51] In addition to other reliability issues, the Court relied on the fact that the *KGB* protocol, including a warning regarding the criminal penalties for dishonesty, had not been followed and as such the trial judge's inadmissibility ruling was upheld. This was a presumptively untrustworthy witness.

In *Bradshaw*, like in *KGB* and *Youvarajah*, the hearsay statement—a video re-enactment of a murder—was from a declarant who was themselves implicated in the offence. He was not under oath and had not been cautioned about the implications of lying. The declarant in *Bradshaw* had a significant motive to lie to mitigate his own culpability in the homicides, had pled guilty to second-degree murder, had a history as a "drug dealer, thug" and "enforcer," and had been deemed a "*Vetrovec* witness."[52]

In both of these cases, the heightened risk of dishonesty flowed from the character of the witness. The type of character the majority in *KGB* was referring to was, as Justice Karakatsanis framed it in *Bradshaw*, "a witness who cannot be trusted to tell the truth due to his unsavoury character."[53] Other examples include, for instance, a declarant who is the

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47 *KGB*, *supra* note 7 at 791.

48 2013 SCC 41 at paras 29, 95 [*Youvarajah*].

49 *Supra* note 39 at para 5.

50 *Supra* note 48 at para 74.

51 *Ibid* at para 33.

52 *Supra* note 39 at paras 5, 68. In the context of corroboration regarding disreputable or unsavoury witnesses, see *R v Vetrovec*, 1982 CanLII 20 (SCC).

53 *Supra* note 39 at para 5.

coaccused in a murder stemming from a joint robbery,[54] an accomplice to a murder who called the victim to the location where it occurred,[55] a case in which numerous declarants gave *KGB* statements about a murdered drug dealer with whom they had worked,[56] and a declarant who was charged with criminal negligence causing death, accessory after the fact to murder, and causing an indignity to a dead body after re-enacting the murder for the police.[57]

In the context of a sexual assault investigation, this interview procedure might properly be applied to a complainant who has been convicted of perjury or fabricating evidence, or one whose own culpability is at issue because she is implicated in the alleged offence, such as, for example, a human trafficking case in which the complainant may have been both trafficked and involved in procuring other women for the purposes of trafficking, or one who was otherwise involved in the criminal enterprise of the individual(s) she accuses of sexually assaulting her.

But women do not become untrustworthy simply by virtue of having been sexually assaulted or by alleging sexual assault, unless one ascribes to the discriminatory stereotype that women are inclined to lie about sexual assault. It is not acceptable—nor lawful from a human rights code or *Canadian Charter of Rights and Freedoms* (*Charter*) perspective—for legal actors to approach women who report sexual offences with a heightened degree of distrust if that skepticism is based on empirically unfounded, legally rejected stereotypes about women, sex, or sexualized violence.

A catalogue of these discriminatory stereotypes has been identified by the Supreme Court in the past three decades in its sexual assault jurisprudence.[58] As the Court highlighted recently in *R. v. Kruk* (*Kruk*), "myths and stereotypes about sexual assault complainants capture widely held ideas and beliefs that are not empirically true—such as the now-discredited notions that ... false allegations for such crimes are more likely

54 *Walsh v R*, 2024 NBCA 5 at para 11.

55 *R v Riley*, 2019 NSCA 94.

56 *R v Bottomley*, 2022 BCSC 2047 at 3.

57 *R v Atwell*, 2023 NSSC 347 at 2–3.

58 See *R v Kruk*, 2024 SCC 7 at para 36.

than for other offences."[59] Some of these stereotypes, the Court observes, "involve the wholesale discrediting of women's truthfulness and reliability."[60] The Court in *Kruk* went on to recognize that these "inaccurate, outdated and inequitable social attitudes" impede the "equal treatment of sexual assault complainants."[61] Police who approach interviews with sexual assault complainants with a heightened degree of skepticism that is founded on these legally rejected stereotypes deny survivors a competent police investigation into the offences perpetrated against them and discriminate on the basis of sex and gender. Imposing the *KGB* protocol on women when they report sexual offences because of these types of social assumptions is discrimination on the basis of sex and gender.

This is not to suggest that the police ought to "believe all victims" or operate from an assumption that sexual assault complainants are prima facie trustworthy. There is a difference between investigating a reported offence in a non-discriminatory manner—by approaching complainants of sexual offences with the same neutrality as other alleged victims—and starting from either the assumption that all sexual assault complainants should be believed or, conversely, that women are less trustworthy because they allege they have been sexually harmed or physically abused by an intimate partner.

The *KGB* protocol is intended for a specific type of witness in a specific type of circumstance. It is not that *KGB* reflects a departure from the principled approach to hearsay.[62] In *R. v. Khelawon* (*Khelawon*), the Supreme Court emphasized that, in determining admissibility, trial judges should adopt a functional approach that focuses on the specific hearsay dangers arising from the specific circumstances of the case.[63]

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59 *Ibid* at para 37.

60 *Ibid*.

61 *Ibid* at para 38.

62 *Khan*, *supra* note 33 at 540. See e.g. *R v U(FJ)*, 1995 CanLII 74 at 778–80 (SCC) [*FJU*]; *R v Khelawon*, 2006 SCC 57 at 788–90 [*Khelawon*].

63 *Supra* note 62 at 818–19. It is true that, in this case, the Supreme Court upheld the Ontario Court of Appeal's decision to exclude an elderly assault complainant's police statement in part because it was not taken under oath or affirmation. It is also true that the declarant in *Khelawon* was warned about the charges he could face if he was dishonest with the police. Justice Charron's view was that the declarant, given his elderly state, ought to have had his evidence taken pursuant to sections 709 to 714 of the *Criminal Code* (see *ibid* at 796). These sections would have provided for the taking of evidence

Indeed, *KGB* itself was premised on the principled approach—of necessity and reliability—to the substantive admission of hearsay. But the indicia of procedural reliability established in *KGB*, particularly the threat of criminal sanction for lying, were intended for cases involving the admission of prior inconsistent statements by "unsavoury witnesses." Such indicia were not meant for cases in which the dangers of hearsay evidence stem from other reasons, including, according to the Court in *Khelawon*, cases in which there is no opportunity to cross-examine the declarant on their statement.

This is not because *KGB* created a new categorical exception to the hearsay rule; it is because, as the majority highlighted in *KGB,* this type of prior inconsistent statement presents a specific reliability matrix that differs from other forms of hearsay.[64] In particular, the *KGB* procedure addresses competing statements from the same questionable witness, on the one hand, and affords an opportunity to cross-examine this witness at trial on the other. A principled approach to hearsay in this context will be different from contexts where the declarant is not presumptively untrustworthy. The post-*KGB* jurisprudence from the Supreme Court[65] indicates that issuing threats to witnesses who do not fit this "unsavoury character" description is not required to establish the substantive admission of a complainant's police statement.[66]

Unfortunately, as documented in Part II, the police in Canada do not appropriately confine their use of this procedure in some cases, and lower courts have not given the police proper or sufficient guidance on the problematic and discriminatory application of *KGB* to women who allege sexualized violence or intimate partner violence.

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under oath and in the presence of opposing counsel (see *Criminal Code*, *supra* note 5, ss 709–14). Of note, section 709 of the *Criminal Code* does not require a caution, nor does this process approach witnesses with a heightened degree of suspicion (see *supra* note 5, s 709). In other words, the Court in *Khelawon* was not suggesting that this complainant be subject to the *KGB* procedure.

64 *KGB*, *supra* note 7 at 786–87.

65 In the latter half of Part I *below*, I discuss post-*KGB* jurisprudence from the Supreme Court and lower courts.

66 See e.g. *FJU*, *supra* note 62 at 786; *Khelawon*, *supra* note 62 at 792–94. See also *R v Devine*, 2008 SCC 36 at paras 20, 25.

C. *An Adult Sexual Assault Complainant's Police Statement Will Almost Never Be Introduced at Trial for the Truth of Its Contents*

In most sexual offence cases, the Crown will not seek to introduce an adult sexual assault complainant's prior inconsistent statement to the police for the truth of its contents. This is because, in most sexual offence cases, if the complainant recants, decides she does not want to continue with the process, is unable to continue, or becomes uncooperative after she has given her police statement, the prosecution will not proceed. This is not a criticism of the Crown. There are two reasons why sexual assault cases, absent the circumstances examined next, often do not proceed in the face of an uncooperative or unable complainant. To be clear, that the legal process seemingly transforms many sexual assault complainants from initially willing participants in the process to uncooperative is a separate and deeply problematic matter—one to which the *KGB* process presumably contributes in the cases in which it is imposed. The point is that once a complainant has become uncooperative or is unable to proceed, in most sexual assault cases involving adult complainants, the Crown will be unable or unwilling to continue the prosecution. This may be one reason why post-charge attrition is so disproportionality high for this offence.[67]

First, for sound public policy reasons, Crown attorneys in Canada are required not to prosecute cases in which there is no reasonable—or realistic, depending on the jurisdiction—prospect of conviction.[68] Given the burden and standard of proof in criminal prosecutions, and the evidentiary requirements necessary to prove sexual assault, in most cases in which an adult sexual assault complainant with capacity is no longer willing or able to testify there will be no reasonable or realistic prospect of conviction.

For instance, the evidentiary record in most sexual assault cases would make it unreasonable or unrealistic to expect a trier of fact to be convinced beyond a reasonable doubt that sexual activity was non-

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67 Statistics Canada, *supra* note 12 at 7.

68 For more on the reasonable prospect of conviction standard, see e.g. Ministry of the Attorney General, "D.3: Charge Screening" (last modified 16 January 2024), online: <ontario.ca> [perma.cc/55M2-UK3G]; Nova Scotia Public Prosecution Service, "The Decision to Prosecute (Charge Screening)" (last modified 3 February 2021) at 2, online (pdf): <novascotia.ca> [perma.cc/7BUU-QX95].

consensual if a complainant is unwilling to testify that it was non-consensual. The *actus reus* for the offence of sexual assault includes the element of non-consent, which for adult women is based on the complainant's subjective state of mind at the time the sexual touching occurred.[69] There will frequently be no reasonable or realistic prospect of convincing the trier of fact beyond a reasonable doubt that the complainant did not want the sexual touching to occur if she testifies that she does not remember whether she consented, that what she told the police was wrong, or that she, in fact, did want the sexual touching to occur despite what she told the police.

However, there are exceptions. These include cases in which there were other alleged victims, eyewitnesses, or the alleged offence was videorecorded—and aspects of the incident, such as incapacity or physical violence, render her lack of consent visible on the video. Exceptions may also include cases in which victims of intimate partner sexual violence recant, depending on the degree of judicial/social understanding regarding the prevalence of this phenomenon.[70] With respect to these exceptions, the Crown may have a reasonable or realistic prospect of conviction despite a complainant who has recanted at trial or is unwilling or unable to testify.

But in most sexual assault cases involving adult women, if the complainant is unwilling to testify that she did not consent to the sexual touching, or she is uncertain or does not remember, it is highly unrealistic to think that a trier of fact would convict. It is difficult enough to convince judges or juries beyond a reasonable doubt when sexual assault complainants are adamant that they did not consent.[71] Even in cases involving child sexual assault complainants, the Crown's prosecution

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69 *R v Ewanchuk*, 1999 CanLII 711 at paras 23–26 (SCC).

70 This social understanding means there could be a reasonable prospect of conviction despite the recant. See e.g. "Domestic Abuse Victims Often Recant Stories: Police, Victim Services, Courts Say Problem Frustrating", *CBC News* (2 February 2012), online: <cbc.ca> [perma.cc/9GLM-KVZT].

71 See e.g. Melanie Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22:2 CJWL 397 at 415–417. See generally *Sexual Assault in Canada: Law,* Legal Practice, and Women's Activism, ed by Elizabeth A Sheehy (Ottawa: University of Ottawa Press, 2012).

standard will make it necessary to withdraw or seek a dismissal of charges in some cases in which a child has recanted.[72]

Second, it will typically not be in the public interest to proceed with a prosecution—the second branch of the Crown's policy on decisions to prosecute[73]—in sexual assault cases in which the complainant is no longer a cooperative and willing participant. Indeed, the policy position of some prosecution services in Canada is to allow sexual assault complainants to determine whether a case will go forward, absent competing persuasive public interests.[74] In most cases, this survivor-centred approach is to be preferred over compelling women to participate.

Persuasive public interests that would warrant proceeding in the face of an unwilling complainant are the exception, but could include, for example, the public's interest in prosecuting a violent, repeat offender, such as an accused for whom a dangerous offender designation would be warranted, or an accused in a serious human trafficking case. There remains significant debate as to whether it is in the public interest to prosecute cases of intimate partner violence involving sexual assault in which the complainant has become uncooperative.[75] However, this would be another circumstance in which the Crown may determine that it is in the public interest to proceed despite a complainant's change of mind. In these cases, the Crown would need to bring an application to admit a complainant's police interview to prove its substance if she recants.

But setting aside the minority of cases in which there remains a reasonable or realistic prospect of conviction and the public interest warrants proceeding in the face of an unwilling complainant, the Crown is very

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72 See e.g. *R v JN*, 2014 ONSC 5394 at para 143 [*JN*].

73 Ministry of the Attorney General, *supra* note 68.

74 See e.g. Nova Scotia Public Prosecution Service, "A Survivor's Guide to Sexualized Violence Prosecutions" at 6, online (pdf): <novascotia.ca> [perma.cc/Y33U-QSW7]. This was reported to me in interviews with senior Crown Attorneys in at least two Canadian provinces. For a discussion of these interviews, see Elaine Craig, "The Ethical Identity of Sexual Assault Lawyers" (2016) 47:1 Ottawa L Rev 73.

75 See e.g. Robert Davis et al, "A Comparison of Two Prosecution Policies in Cases of Intimate Partner Violence: Mandatory Case Filing Versus Following the Victim's Lead" (2008) 7:4 Criminology & Pub Pol'y 633 at 634–635; Mary A Finn, "Overview Of: Evidence-Based and Victim-Centered Prosecutorial Policies: Examination of Deterrent and Therapeutic Jurisprudence Effects on Domestic Violence" (2013) 12:3 Criminology & Pub Pol'y 441 at 441.

unlikely to continue a prosecution for sexual assault if an adult complainant becomes uncooperative or "changes her story." A review of sexual assault case law strongly supports this conclusion.

A search on CanLII, across all years, using the terms "*KGB* application" and "sexual assault" yielded only thirty-four cases.[76] In less than twenty of these thirty-four cases, the Crown attempted to admit a sexual assault complainant's police statement for the truth of its contents. Almost all of these twenty cases involved either a child complainant whose statement was not taken pursuant to the *KGB* procedure[77] or a human trafficking or intimate partner violence case.[78] In this sample, other than human trafficking and intimate partner violence cases, this search yielded only one reported decision involving an adult sexual assault complainant in which the complainant's police statement was admitted to prove its substance through a hearsay application. In that single case, the declarant was deceased, and her statement was admitted despite the complainant not having been subjected to a *KGB* protocol.[79]

A further search on CanLII using the terms "sexual assault," "videotape," and "*Bradshaw*" yielded only three cases in the seven years since *Bradshaw* was released in which the Crown attempted to introduce an adult sexual assault complainant's police statement for the truth of its contents.[80] None of the complainants in these cases were available to

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76 CanLII search conducted May 28, 2024. Using the term "*KGB* application," rather than "*KGB* statement," the search from the past five years was intended to yield cases in which the Crown brought a hearsay application to introduce a sexual assault complainant's police statement for the truth of its contents.

77 A child sexual assault complainant's videotaped statement (or the statement of any witness under eighteen) may be admitted for the truth of its contents through section 715.1 of the *Criminal Code* if the child adopts the statement at trial and is available for cross-examination (see *supra* note 5, s 715.1).

78 See *R v Belzil*, 2021 ONSC 781 at paras 1, 25; *R v OM*, 2020 ONSC 5950 at para 1 [*OM*]; *R v AW*, 2020 ONCJ 670 at para 1 [*AW*]; *R v NA*, 2017 ONCJ 196 at para 75 [*NA*]. But see *R v PMC*, 2016 ONCA 829 at para 27; *JN*, *supra* note 72 at para 143; *R v RFL*, 2011 ONSC 1900 at paras 1–2; *R v S (SW)*, 2005 CarswellOnt 6900 at paras 3–4, 17–18, 68 WCB (2d) 55 (ONSC) [*SWS*].

79 *R v Desjarlais*, 2010 BCPC 96 at paras 37–38 [*Desjarlais*]. See also *R v H(S)*, 1998 CanLII 31296 (ONCJ) at para 36 [*SH*].

80 *R v Adekunle*, 2022 ONSC 5552 [*Adekunle*]; *R v VO*, 2021 ONCJ 709 [*VO*]; *R v Caron*, 2019 BCPC 173 [*Caron*]. There was a fourth case produced using this search result, but it involved intimate partner violence (see *R v Ryall*, 2018 ABPC 14). In *R v*

testify at trial: in two cases, the complainants were not competent to testify,[81] and in the third case, the complainant had left Canada.[82] Although the third complainant's police interview was videotaped, it was not taken under oath or solemn affirmation, and she was not cautioned. It was nevertheless admitted because of a combination of substantive and procedural reliability factors, including—with respect to the latter—that the interviewer used open-ended and non-leading questions, the timing of the interview, and an acknowledgment by the complainant that she would tell the truth.

The search terms "sexual assault" and "videotape" did not yield any additional reported decisions revealing Crown applications in these types of cases. Instead, this search produced numerous cases involving child sexual assault complainants and videotape statements introduced pursuant to section 715.1 of the *Criminal Code*.[83]

A search using the terms "hearsay application" and "sexual assault" across all years produced twenty-two cases on CanLII. Most of these cases involved child complainants (and often section 715.1 applications).[84] Only two of these cases were ones in which the Crown brought hearsay applications to introduce the police statements of adult sexual assault complainants: *R. v. Spour* (*Spour*) and *R. v. R.B.*[85] In *Spour*, the

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Ryall, the complainant, who was subjected to the *KGB* procedure, was served with two subpoenas and did not appear either time (see 2018 ABPC 14). Repeated efforts were made to secure her attendance. Ultimately, the court admitted her statement.

81 *Adekunle*, *supra* note 80 at para 41; *Caron*, *supra* note 80 at para 6. Note that in both *Adekunle* and *Caron*, there were questions regarding the competency of the witness at the time the police statement was given. In *Caron*, she was found to be competent when the statements were made but not at the time of trial (see also *Khelawon*, *supra* note 62).

82 *VO*, *supra* note 80 at para 44.

83 CanLII search conducted June 4, 2024 using the search term "videotape" and "sexual assault."

84 See e.g. *R v ARA*, 2023 ONCJ 419 at paras 1–3; *R v Daniel Bovay*, 2021 ONSC 3092 at paras 1–2; *R v RH*, 2021 ONCJ 221 at para 1; *R v AC*, 2019 ONCJ 789 at paras 2, 11; *R v RA*, 2017 ONCA 714 at paras 1, 7; *R v RK*, 2024 ONCA 340 at paras 1, 5, 9 [*RK*]; *R v SS*, 2017 ONSC 5459 at paras 1, 3–4. In *R v MW*, the complainant was eighteen years old at trial but sixteen when she gave her police statement (see 2019 ONSC 5951 at paras 1, 85–86).

85 *R v Spour*, 2020 ONCJ 679 at paras 1–2 [*Spour*]; *R v RB*, 2017 ONCJ 917 at paras 1–2, 31 [*RB*].

eighty-six-year-old complainant's statement was taken under oath and videotaped. The Crown brought an application to have her police interview admitted for its truth because of the complainant's fear of leaving her apartment, her anxiety and depression, and her fear of seeing the accused. Defence counsel conceded reliability of the statement but contested the necessity of admitting it rather than requiring her to testify. The court refused to relax the necessity criteria.[86]

In *R. v. R.B.,* the complainant alleged a violent physical and sexual attack by her cousin. Her statement to the police was videotaped but was not under oath or affirmation, and she was not warned of the severe consequences of lying. She died before trial. There was confirmatory evidence in the form of DNA, blood on her mattress, and evidence of her physical injuries. Her statement was admitted for its truth.[87]

A CanLII search across all years using the terms "prior inconsistent statement," "police interview," "sexual assault," and "hearsay"[88] added only two further cases in which the Crown brought an application to introduce a sexual assault complainant's police interview: *R. v. Muthuporuthotage* (*Muthuporuthotage*) and *R. v. Assoun* (*Assoun*).[89] In *Muthuporuthotage*, the complainant's statement accusing a massage therapist of sexual assault was not taken under oath, nor was she cautioned, nor was there an opportunity to cross-examine her. She died prior to trial and there was no preliminary inquiry. The statement was not admitted. However, even had the full-*KGB* procedure been employed, it seems highly unlikely that this statement would have been admitted. The complainant made a handwritten statement a few hours after her police interview that contradicted aspects of what she told the police.[90] That the accused had no opportunity to ask her about it strongly suggests that this is not a case in which her videotape statement would have been admitted to prove its contents even if it had been sworn and cautioned. The complainant in *Assoun* was subjected to the full-*KGB* protocol. She also died before trial.

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86 *Spour*, *supra* note 85 at para 54.

87 *RB*, *supra* note 85 at para 62.

88 The following query produced this result: "prior inconsistent statement" and "police interview" and "sexual assault" and "hearsay."

89 *R v Muthuporuthotage*, 2018 ONCJ 741 at paras 1–2 [*Muthuporuthotage*]; *R v Assoun*, [1999] NSJ No 497 at paras 1–4, 2000 CanLII 14366 (NSSC) [*Assoun*].

90 *Muthuporuthotage*, *supra* note 89 at paras 6–11.

However, she testified and was cross-examined at the preliminary inquiry. Her statement was admitted.[91]

To summarize, these different searches, across all years, produced only nine cases in which the Crown brought a hearsay application to introduce an adult sexual assault complainant's police interview in sexual offence cases other than ones involving human trafficking or intimate partner violence—although, even including those cases, the number is still very small. In four of these nine cases, the complainant's statement was admitted despite her not having been subjected to the full-*KGB* procedure.[92] In a fifth, the complainant was subjected to the full-*KGB* procedure, but the statement was not admitted.[93] In two others, the Crown's hearsay application was denied but for unrelated reasons.[94] There were no reported decisions involving hearsay applications to admit the police statement of a recanting adult sexual assault complainant other than in intimate partner violence and human trafficking cases.

While this research does not purport to have captured every case in which the Crown brought a hearsay application regarding an adult sexual assault complainant, that so very few can be found using these different search terms reveals how infrequently these applications are brought. Reported case law strongly supports the contention that, except in cases involving intimate partner violence or human trafficking, the Crown rarely seeks to introduce an adult sexual assault complainant's police statement for the truth of its contents. Even applications in human trafficking and intimate partner violence cases are relatively infrequent. The Crown virtually never seeks to introduce a prior inconsistent statement to prove sexual assault in the face of a recanting victim in a case with an adult complainant that does not involve intimate partner violence or human trafficking. Moreover, in the minority of cases in which the Crown has brought a hearsay application regarding the complainant's police interview, the statement's admissibility has not turned on whether the complainant was subjected to the full-*KGB* procedure. In other words, there

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91 *Assoun*, *supra* note 89 at para 65.

92 *SH*, *supra* note 79 at para 36; *Desjarlais*, *supra* note 79 at para 50; *RB*, *supra* note 85; *VO*, *supra* note 80 at para 92.

93 *Spour, supra* note 85 at para 19.

94 *Adekunle*, *supra* note 80 at paras 77–80; *Caron*, *supra* note 80 at paras 37–47.

would appear to be no reason for putting women through this process in the vast majority of sexual assault investigations.

D. The Types of Cases in Which It Is Justifiable and Non-Discriminatory to Subject Sexual Assault Complainants to a KGB Procedure Are Discrete and Often Discernible

A proper application of the *KGB* procedure by the police in sexual assault investigations should be driven by three types of questions. First, are there any indicia to suggest that this is a case in which it will become necessary for the Crown to seek substantive admissibility of the complainant's statement because either the witness or her evidence have become unavailable? Second, is this a case in which the Crown would conceivably proceed with the prosecution even if the complainant became an uncooperative witness? This question is oriented to the public policy considerations upon which the Crown's decision to prosecute is founded: are there evidentiary elements to this case which suggest there would be a reasonable or realistic prospect of conviction even if the complainant becomes uncooperative or recants at trial? If so, would it be in the public interest to compel a complainant to testify in this case? Third, if this is a case in which the Crown would proceed regardless of the complainant's willingness to cooperate, is this complainant of a character or has she behaved in a manner such that her evidence should be approached with a heightened degree of distrust? While the police may not always know the answers to these questions before a videotape interview with the complainant, in some cases, they do.

If the answer to either of the first two questions is no, then the interview should be videotaped, as is ideal for all police interviews, but the other parts of the *KGB* protocol should not be applied. As the Ontario Court of Appeal observed in *R. v. Trieu*, and affirmed in *R. v. Ivall*, in cases in which a police statement is video-recorded and the declarant is available for cross-examination, the oath's role in the procedural reliability assessment is a modest one.[95] As is true of other types of cases, the complainant's availability for meaningful cross-examination at trial is the

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95 *R v Trieu*, 2005 CanLII 7884 at para 73 (ONCA). The Ontario Court of Appeal adopted this reasoning in *R v. Ivall after* the Supreme Court of Canada's decision in *Bradshaw* (see *R v Ivall*, 2018 ONCA 1026 at para 89 [*Ivall*]; *Bradshaw*, *supra* note 39).

most important factor determining the substantive admissibility of her police statement, should circumstances arise that require the Crown to pursue this strategy.[96]

If the answer to the first two questions is yes—there are indicia suggesting possible necessity, and this is a case in which the Crown may proceed regardless of the complainant's willingness—then the interview should be videotaped and taken under oath or affirmation, but the complainant should not be cautioned. Only if the answer to all three questions is yes should the full-*KGB* protocol be deployed.

Legal actors, whether police, courts, or the Crown, should not conflate a heightened risk of unavailability of a witness or her evidence at trial with a heightened risk of dishonesty from the witness during a police interview. To explain further, vulnerability factors such as the risk of drug overdose or precarious housing, or factors that increase the likelihood a witness will recant, such as the social conditions that make it difficult for women to extricate themselves from cycles of intimate partner violence,[97] heighten the risk of unavailability of a witness or her evidence at trial. These factors may establish the necessity criteria for the police, but do not indicate that the witness poses a heightened risk of dishonesty during a police interview.

Take the example of a complainant caught in a cycle of intimate partner violence, and thus at risk of recanting after she has given her police statement. She may be more likely to be dishonest or misleading in her evidence at trial, but there is presumably not a heightened risk of dishonesty during her police interview simply because the offence alleged is an assault by her intimate partner. An alleged victim of intimate partner violence should only be subject to the *KGB* procedure if the police are concerned, and for non-stereotypical, non-discriminatory reasons, about a false accuser—not a false recanter.

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96 *Youvarajah*, *supra* note 48 at para 35. A refusal or inability to answer questions on cross-examination does not meet this standard (see *R v Conway*, [1997] OJ No 5224 at para 31, 1997 CanLII 2726 (ONCA); *R v Diu*, 2000 CanLII 4535 at para 92 (ONCA)).

97 See e.g. Joanne Hulley et al, "Intimate Partner Violence and Barriers to Help-Seeking Among Black, Asian, Minority Ethnic and Immigrant Women: A Qualitative Metasynthesis of Global Research" (2023) 24:2 Trauma Violence & Abuse 1001.

In cases in which the Crown would proceed in the face of an uncooperative or unavailable complainant who is *not* of "unsavoury character" and on which there is some basis to believe the necessity criteria could be established, police should take videotaped statements under oath or affirmation, but should not subject complainants to the warnings or cautions the Court in *KGB* intended for accomplices, accused or criminally involved witnesses, and others with a recognized history of fabricating evidence. If necessary, police may explain to them the significance and consequences of their statement for the accused and the importance of telling the truth.[98] But the police should treat women who allege sexual assault like other alleged victims.

This is also true of alleged victims of intimate partner violence. Their statements should be videotaped, and they should be taken under oath or affirmation if there is a legitimate risk of recantation, but they should not be cautioned and threatened with criminal penalties absent factors indicating that they are an untrustworthy witness. It makes no sense to do this to them at a police station, where they are more likely to be telling the truth, but not on the stand when they testify and actually may be at a heightened risk of providing inaccurate evidence, given what we know about the social, emotional, and financial factors that pressure victims of intimate partner violence to recant.[99]

In the relatively small number of cases in which the Crown does bring a hearsay application regarding an adult sexual assault complainant's police statement, admissibility does not turn on whether the complainant was subjected to the *KGB* procedure.[100] Similarly, in several of the reported sexual assault decisions in intimate partner and human

98 See e.g. *SWS*, *supra* note 78 at para 50.

99 See e.g. Marianna Mazza et al, "Intimate Partner Violence: A Loop of Abuse, Depression and Victimization" (2021) 11:6 World J Psychiatry 215 at 216; Amy E Bonomi et al, "'Meet Me at the Hill Where We Used to Park': Interpersonal Processes Associated with Victim Recantation" (2011) 73:7 Soc Science & Medicine 1054 at 1055; Rachel Louise Snyder, *No Visible Bruises: What We Don't Know About Domestic Violence Can Kill Us* (New York: Bloomsbury, 2019).

100 See *SH*, *supra* note 79 at para 27; *Desjarlais*, *supra* note 79 at para 51; *VO*, *supra* note 80 at para 93; *RB*, *supra* note 85.

trafficking cases in which the Crown's application was successful, the complainant's statement was admitted without a full *KGB* protocol.[101]

In many cases in which the Crown's application in relation to an adult complainant in a human trafficking or intimate partner violence case was successful, courts relied on the fact that the out-of-court statements were videotaped, evidence that the declarant understood the significance of the allegations they were making, and attributes of the interview technique such as the use of open-ended, non-leading questions, to find that the procedural reliability criteria had been met.[102] This includes cases decided after the Supreme Court's 2017 decision in *Bradshaw*.[103] Provided interviews are videotaped, and there is a meaningful opportunity for cross-examination at trial or at an earlier time, such as at a preliminary inquiry,[104] these statements are still likely to be admitted in the minority of cases in which the Crown seeks their admission post-*Bradshaw*. The reasoning in post-*Bradshaw* case law supports this contention.[105] That courts appear willing to admit police statements without the full-*KGB* procedure in the minority of cases in which the Crown does bring an application[106] makes it even more problematic that some women are subjected to this procedure by the police when they report sexual violence.

Not only do Crowns seldom attempt to introduce adult complainants' police interviews to prove their substance in sexual assault prosecutions, but in addition to the harms they can cause, these *KGB* cautions are highly unlikely to have any independent beneficial effect. In terms of their potential to deter witnesses from lying or recanting, "There are exceptionally few

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101 See *AW*, *supra* note 78; *NA*, *supra* note 78 at paras 11, 84; *OM*, *supra* note 78 at paras 4, 7.

102 *OM*, *supra* note 78 at para 68; *AW*, *supra* note 78 at para 10; *NA*, supra note 78 at para 11.

103 See *OM*, *supra* note *78*; *AW*, *supra* note 78.

104 *RK*, *supra* note 84 at para 14, aff'g *R v Keewasin*, 2016 ONSC 5463; *R v Mitchell*, 2023 ABCA 119 at para 44 [*Mitchell*]. It is true that in *Mitchell*, the complainant adopted her interview at the preliminary inquiry.

105 *Ivall*, *supra* note 95 at para 89; *R v Lawrence*, 2020 ABQB 144 [*Lawrence*]; *R v Dhillon*, 2018 ABQB 369 [*Dhillon*]; *R v Admasu*, 2021 ABQB 386 [*Admasu*]; *RK*, *supra* note 84 at para 14; *Mitchell*, *supra* note 104 at para 44.

106 See e.g. *Ivall*, *supra* note 95 at para 89; *Lawrence*, *supra* note 105 at paras 58–59; *Dhillon*, *supra* note 105 at paras 30–41; *Admasu*, *supra* note 105 at paras 147–57; *Mitchell*, *supra* note 104 at para 44.

prosecutions against recanting KGB witnesses ... despite the fact that the practice is not uncommon."[107] Moreover, as the dissent in *KGB* observed, some criminal sanctions attach to false police statements even when they are not given under oath, suggesting an oath is not necessary to ensure that these provisions serve whatever possible deterring function is intended.[108]

In addition, research indicates that a majority of Canadians would understand less than half of the language of most *KGB* warnings used by police in Canada.[109] As a consequence, many of those subject to *KGB* warnings are likely not getting these warnings' intended message. The message sexual assault survivors *are* sure to receive when they are subjected to this procedure is that the police are inherently suspicious of their allegation, or worse, that police assume that they are lying about what happened to them. In addition, and unsurprisingly, cautioning witnesses before they provide a statement may have an adverse impact on the amount of information police obtain from them.[110] Criminologists have demonstrated that the average length of responses is significantly shorter from witnesses who are given this type of warning by police before their interviews.[111]

Based on their preliminary knowledge of the case before conducting these interviews, officers should be aware of the senselessness (and harm) of putting sexual assault complainants through this process in most cases. The limited circumstances in which the police may have reason to ask a complainant to provide her videotaped statement under oath or solemn affirmation, but not to caution her, because this is the type of case in which the Crown might proceed regardless of a complainant's willingness, include

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107 Uniform Law Conference of Canada, *Working Group on Contradictory Evidence: Criminal Liability for Recanted K.G.B. Statements* (Victoria: Uniform Law Conference of Canada, 2013) at 3, online: <ulcc-chlc.ca> [perma.cc/7GJJ-RUZE].

108 *KGB*, *supra* note 7 at 821.

109 Kirk Luther et al, "Securing the Admissibility of Witness Statements: Estimating the Complexity and Comprehension of Canadian 'KGB Warnings'" (2015) 30:3 J Police & Crim Psychology 166 at 170, 172.

110 Brent Snook & Kathy Keating, "A Field Study of Adult Witness Interviewing Practices in a Canadian Police Organization" (2011) 16:1 Leg & Criminological Psychology 160 at 167.

111 *Ibid.*

1. cases of sexual violence allegedly perpetrated by an intimate partner in which the Crown would be inclined to prosecute even if a complainant becomes uncooperative or unavailable;
2. human trafficking cases, given the particular vulnerabilities of these victims and their potential exposure to pressure not to testify;
3. cases in which there are indications that a complainant may become unavailable due to serious illness, death, or absence from the country; and
4. cases in which there is a pressing public interest on the basis of public safety—such as an accused against whom the Crown might be likely to seek a dangerous offender or long-term offender designation.

The police should only add a *KGB* caution in cases in which there is some likelihood a hearsay application might be brought—cases such as the four types just enumerated—*and* the complainant is the type of witness contemplated by the Court in *KGB* and *Bradshaw*, namely one who is presumptively less trustworthy.[112]

II. *KGB* SEXUAL ASSAULT CASE LAW

Police interviews with sexual assault complainants can be helpfully divided into three categories for purposes of this discussion: (i) cases in which the complainant's statement should simply have been videorecorded as is done with victims of other offences; (ii) cases in which it was defensible to videorecord and require that the complainant swear an oath or solemnly affirm to tell the truth but discriminatory to caution her; and (iii) cases in which the nature of the case or the character of the complainant also warranted a warning and threat of sanction for dishonesty.

A. Cases in Which the Complainant's Statement Should Simply Have Been Video Recorded

In the following cases, there appeared to be no reason—beyond stereotypical thinking—to assume that the complainant would be dishonest. The Crown was virtually certain not to seek to introduce the complainant's police statement should she no longer wish to proceed, and there

112 *KGB*, *supra* note 7 at 793; *Bradshaw*, *supra* note 39 at para 5.

was nothing to suggest that the requirement of necessity would have arisen at trial (such as recantation, death, severe illness, or potential absence from the jurisdiction). Yet, when the women and girls in these cases reported to the police, they were subjected to a full or partial *KGB* procedure.[113]

While these cases do not fit the criteria warranting a *KGB* protocol, many of these examples *do* parallel the stereotypes about sexualized violence identified by the Supreme Court in its sexual assault jurisprudence[114]—the same stereotypes that researchers have shown often inform how police assess the credibility of sexual assault complainants.[115] The women in these examples are Indigenous, have intellectual disabilities, or had consensual sex with the accused on other occasions. They do not have physical injuries. They were not raped by strangers. They made choices to be alone with the accused, or that otherwise do not comport with the "ideal victim." In other words, these women paradigmatically exemplify many of the discriminatory stereotypes used to discredit sexual assault complainants identified by the Supreme Court. What these women are not are police informants, confirmed perjurers, coaccused, or accomplices to the sexual violence they alleged. They should not have been treated as such when they turned to the police to report experiences of sexual victimization.

Consider the following recent examples. In *Figg v. R.* (*Figg*), the complainant was a forty-year-old Indigenous woman.[116] There was some

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113 Some decisions which refer to *KGB* statements do not stipulate whether the complainant was cautioned and/or sworn. It is defensible to draw the inference that the reference to a witness's police statement as a *KGB* statement connotes that at least some part of the *KGB* protocol was employed. Given that courts do not refer to the police statements of complainants in cases involving other offences as "*KGB* statements," it is reasonable to conclude that the label is intended to connote that the witness was subject to some or all parts of the *KGB* protocol.

114 See *Kruk*, *supra* note 58 at para 38.

115 See e.g. Johnson, *supra* note 19 at 52; Jessica Shaw et al, "Beyond Surveys and Scales: How Rape Myths Manifest in Sexual Assault Police Records" (2017) 7:4 Psychology Violence 602 at 603–04; Jordan, *supra* note 19 at 48; Eryn Nicole O'Neal, "'Victim is Not Credible': The Influence of Rape Culture on Police Perceptions of Sexual Assault Complainants" (2019) 36:1 Justice Q 127 at 131; Tina Hattem, "Highlights from a Preliminary Study of Police Classification of Sexual Assault Cases as Unfounded" (last modified 20 January 2023), online: <justice.gc.ca> [perma.cc/PA2X-VE9Q].

116 2022 NBCA 30 at para 3 [*Figg*].

suggestion that she had an intellectual disability. She worked part-time as a custodian in the Kingsclear First Nation community where she lived. She met the forty-nine-year-old accused for the first time on the day he sexually assaulted her, at the convenience store where she worked. She attended at his residence later that day. He imposed a series of sexual acts on her, which she alleged were non-consensual, and during which she alleged she was afraid he would hit her. The accused admitted to the sexual acts but maintained that they were consensual. Shortly afterwards, she called her brother crying. The accused was convicted.

This case turned on whether the complainant, LAS, subjectively consented to the sexual acts that occurred. The complainant's credibility was key to a conviction in this case.[117] Had LAS recanted after her *KGB* statement was taken or indicated that she was not sure whether she consented, a Crown Attorney properly applying the prosecution standard would have been highly unlikely to proceed. First, the Crown would have had no reasonable prospect of conviction if LAS was unwilling to testify at trial that she did not consent to the sexual acts that occurred—or that she was unsure as to whether she consented. Again, the critical issue in this case, according to the trial judge, was credibility.

Second, this was not a circumstance of intimate partner violence. She was presumably not in danger of future violence from this man. Nothing in the reported decision suggests that this was a case in which it would be in the public interest to force this sexual assault survivor to testify against her wishes, even if the Crown had had a reasonable prospect of conviction without her cooperation. There was no indication that LAS was grievously ill, dying, or otherwise likely to become unavailable to testify. This is not the type of case in which there was any reasonable basis to assume that the Crown would attempt to rely on the complainant's police statement for the truth of its contents at trial. Moreover, nothing in the reported decision suggests that the police had any non-discriminatory basis upon which to believe that LAS was an "unsavoury" or "untrustworthy" character, suggesting a heightened risk she would be dishonest with them. The trial judge found her to be entirely credible. The complainant's statement was not admitted for the truth of its contents. Based on the information available in the reported decision, there was no justification for treating this Indigenous woman differently than any

117 *Ibid* at para 5.

other person who reports an experience of criminal victimization to the police.

The same appears to be true of the police treatment of the complainant in *R. v. P.C.H.* (*PCH*).[118] PH was convicted of touching his ten-year-old daughter for a sexual purpose and of vaginally penetrating her with his penis.[119] The conviction was decided "on [the basis of] credibility."[120] In upholding his conviction, the Nova Scotia Court of Appeal made several references to a *KGB* statement taken from the complainant when she was in her twenties. Again, there was no indication that the complainant had a history of perjury or criminal involvement. She was obviously not a co-accomplice or implicated in the offences being investigated. The only alleged motive for lying came from her father after he was accused.[121] He asserted that she was accusing him of sexual assault because he had promised to give her money if she graduated from high school but then reneged. This supposed motive to lie, which the trial judge resoundingly rejected, and which presumably came after her *KGB* statement in response to her allegations, is the sort of response frequently offered when adults are accused of sexually abusing children. Consent is not a defence in such cases, and a coherent defence theory requires some explanation as to why a complainant would accuse their parent of sexually assaulting them. This is not the type of circumstance or witness contemplated by the Supreme Court in *KGB*. The Crown did not seek to have the complainant's statement admitted for the truth of its contents.

In *R. v. St Germaine*, an eighteen-year-old Indigenous woman who was having difficulty at home walked for hours to the accused's apartment in Prince Albert, Saskatchewan.[122] She alleged that when she arrived, the accused implied a sexual relationship would be required if she wanted to stay and then imposed sexual acts on her without her consent. The accused denied that any sexual activity occurred. She left his apartment shortly after the incident and called her father to pick her up. She waited outside the apartment building for two hours for him. Shortly after he arrived, the police, whom she did not call, also arrived. She eventually

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118 2019 NSCA 63. For a very similar example, see *R v IJ*, 2018 NBPC 4.

119 *Ibid* at para 1. PH appealed his conviction on the basis of ineffective counsel.

120 *Ibid* at para 3.

121 *Ibid* at para 33.

122 *R v St Germaine*, 2023 SKPC 49 at para 7.

attended at the police station where "[the complainant] agreed to provide a KGB statement to the officer."[123] The *KGB* statement was not introduced for its substance at trial. Credibility was the central issue in this case. The trial judge concluded that he did not know whom to believe and acquitted. Like *Figg* and *PCH*, nothing in the reported decision suggests that this was a case in which the Crown would have proceeded had the complainant been unwilling to testify that the sexual activities were non-consensual; neither the complainant's history nor the circumstances made her less trustworthy. Like *Figg*, the complainant in this case was an Indigenous woman.

In *R. v. F.C.*, the complainant and the accused were acquaintances who met at the gym. They had no other relationship beyond the alleged incident, which occurred at a Christmas party four years before the complainant reported it to the police. She had not seen the accused for several years by the time she reported the incident. There was no indication that the complainant or her evidence would become unavailable. There appear to be no public interest factors that would warrant compelling her to testify if she changed her mind, and nothing in the reported decision reveals any suggestion that the complainant was an "unsavoury character" in the sense contemplated by Chief Justice Lamer in *KGB*.

In *R. v. Pryce*, a 2023 case from New Brunswick, the nineteen-year-old complainant and thirty-eight-year-old accused were coworkers in an elderly care facility.[124] She alleged that he sexually assaulted her twice on one shift. The complainant reported the "sexual assault to her employer and provided a KGB statement to the police."[125] The accused pled guilty. Nothing in the sentencing decision suggests the police had any basis for treating this young woman differently than other alleged victims of crime who give statements to the police.

R. v. Orser (*Orser*) provides another example in which there appears to be no justification for imposing the *KGB* procedure, or part of it, on a victim of sexualized violence.[126] *Orser* involved the sexual assault of a sixteen-year-old girl by a thirty-year-old man. The accused was the ex-

123 *Ibid* at para 17.

124 2023 NBPC 10 at 2–3.

125 *Ibid* at 3.

126 2018 NBPC 2.

boyfriend of the complainant's friend. She went to his house distraught after breaking up with her boyfriend. While he began by consoling her, the accused then initiated a sexual interaction by kissing her. When she advised him that she did not want to engage in sexual activity, he held her down and, against her verbal and physical protests, put his mouth on her genital area and then penetrated her vagina with his penis. After the assault, the complainant's mother witnessed bruising on her daughter's chest area above her breastbone. Several weeks later, the complainant disclosed the attack to her mother, who immediately took her to the police station where they both provided written statements.

Following these written statements, the police took a *KGB* statement from this sixteen-year-old girl. Nothing in the reported decision indicates that the *KGB* protocol was warranted. There was no application to prove its substance at trial. It is clear that the complainant was not an "unsavoury character" nor, obviously, was she implicated in the offence. In convicting the accused, the trial judge concluded that there was no evidence of any motive to fabricate the allegation, and any suggestion otherwise was purely speculative on the part of the accused.[127] The police would have had a clear sense of the nature of the case they were investigating from the written statements provided by the complainant and her mother before they interviewed her. It is unlikely the Crown would have proceeded in this case if the complainant had been unwilling to testify. There were no other indicia to establish necessity. It is unacceptable to require a complainant in this circumstance to give their statement under oath or to threaten them with the criminal consequences of perjury. Police do not subject victims of fraud or car theft to such treatment.

B. Cases in Which Requiring the Complainant to Swear an Oath or Solemnly Affirm Her Statement Was Defensible but There Was No Justification for Cautioning Her

In some sexual assault investigations, particularly ones involving ongoing sexual partners, the police appear to conflate a heightened risk of unavailability of the witness, or her evidence, with a heightened risk of dishonesty of the witness. As already explained, in cases in which there is a concern that women, or their evidence, could become unavailable, and

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127 *Ibid* at para 44.

it is conceivable that the Crown would proceed regardless, statements should be videotaped and taken under oath or affirmation, but absent a non-discriminatory basis for treating complainants with heightened suspicion, they should be treated like complainants of other offences. A videorecorded statement can be taken under oath or solemn affirmation, without threatening complainants with what will happen to them if they are dishonest or mislead the police. The women in the following cases were not coaccused, accomplices in their own victimization, or known perjurers. While they very much match the catalogue of rape myths rejected by the Supreme Court, they do not fit the character of witness contemplated by the Court in cases like *KGB* and *Bradshaw*. There appears to have been no basis for the police to approach interviews in these cases as if there was a heightened risk that these women would be dishonest. Unless, that is, one accepts the empirically unfounded and discriminatory stereotype that sexual assault complainants are more likely to lie to the police than other types of complainants.[128] These cautions surely risked signalling to these women that the police responded to their allegations (and them) with skepticism and distrust.

The complainant in *R. v. Mcleod* was a fifteen-year-old Indigenous girl in a remote northern community involved in a sexual relationship with the thirty-year-old accused.[129] He was charged with sexual assault causing bodily harm and sexual interference after she awoke to find herself bleeding, black and blue, and covered with bite marks on her arms, shoulder, breast, and hand. They had been drinking earlier in the day when he became angry with her for wanting to leave, took away her boots and coat, broke her phone, and told her to go to his room and sleep. She followed his orders out of fear and later awoke feeling pain all over her body. She ran home, and her mother called the police. She disclosed to the police that she and the accused were in an on-again/off-again sexual relationship and that he had hurt her in the past. In a bail review decision in this case, the court noted that while the Crown would have to rely on circumstantial evidence to prove that the accused caused the injuries to the complainant's body, given that she was not conscious when they occurred, this was not true of the sexual interference charge:

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128 See *Kruk*, *supra* note 58 at para 37.

129 2021 NWTSC 4 at 1–2, 13 [*McLeod*].

> But for the sexual interference charge that covers a broader time frame, the Crown has the direct evidence of K.M., and I understand from what the Crown has said that she provided a sworn KGB statement about this. So even if she becomes uncooperative or reluctant because of her relationship with the accused, the Crown may not be entirely reliant on her in-court testimony to prove its case.[130]

This is a case in which there was a reasonable basis to believe that the complainant's evidence might become unavailable, thus satisfying the necessity criteria under the principled exception to hearsay. She was a teenager in an on-again/off-again relationship with an individual who she said had perpetrated the same type of violence against her in the past. There was a basis for the police to be concerned that she would recant.

This was also a case in which the Crown might proceed even if she became uncooperative: the sexual interference charge would not require the Crown to prove lack of consent; there was physical evidence of serious injury; the complainant was a child; and the public safety interest was high given the nature of the allegations. The police were justified in asking that the statement be given under oath or affirmation so that a trier of fact would not be confronted with weighing sworn and unsworn evidence at trial, should she recant. But there was no suggestion in the reported decision that she had a history of lying to the police; she was clearly not an accomplice to the offence they were investigating. This fifteen-year-old Indigenous girl ought not to have been subjected to a *KGB* caution.

In *R. v. Nepoose*, the Crown brought a successful application to introduce the complainant's police statement for the truth of its contents at trial; the police were unable to locate her to testify at trial, creating necessity.[131] It is unsurprising that the complainant had absented herself by the time of the trial. The violence perpetrated against her by the accused in this case was horrific, and the prospect of testifying against him must have been terrifying. Given what can be gleaned from the reported decision, her experience reporting the attack to the police is likely to have made her even more unlikely to proceed with the case post-charges.

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130 *Ibid* at 10.

131 2020 ABQB 438 at para 13 [*Nepoose*].

The complainant in this case lived with the accused. She was found by the police in her bathroom, with the accused elsewhere in the apartment. Her father had called the police after the accused sent him text messages threatening to kill her and images of the complainant bruised and cut. When the police found her, she had a cut and swollen face, bruises to both eyes, and bruises to her left ear, neck, forearms, right elbow, and lower legs. She had bite marks on the tops of her feet and injuries to her hands. Her brassier was on the bathroom floor, covered in blood.[132]

Before being taken to the hospital, she was transported to the police station and a *KGB* statement was taken from her. According to the decision, the interview started with this: "At the outset, the Complainant was advised that she was not under arrest and if she decided that she just wanted to leave, she could do so at any time. She was also told that she was not being forced to stay there, and she confirmed that she understood."[133] What frame of reference, what mindset, were these police officers operating from that they thought it necessary to tell this woman, under these circumstances, that she was not under arrest?[134]

Next, the interviewers "read to the Complainant a Recorded Cautioned Witness Statement."[135] Like the examples offered in the introduction, she was warned about the many criminal offences with which she could be charged and the "severe penalties," including lengthy periods of incarceration she would face if she intentionally misled the police or lied.[136]

The police found this woman in her bathroom—bleeding, bruised, and bitten—following a phone call to them from her father, who had received text messages from the accused threatening to kill his daughter. These were the circumstances under which this complainant was interviewed before being taken to the hospital. According to the court, there was no evidence to suggest a possible fabrication. To the contrary, "[t]he physical injuries evident to the police at the scene, those who saw her at

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132 *Ibid* at paras 28–34.

133 *Ibid* at para 16.

134 *Ibid.*

135 *Ibid* at para 17.

136 *Ibid.*

the police station, her father when he picked her up, and as outlined in the medical evidence all corroborated her statement."[137] No doubt. It was neither appropriate nor humane to treat this witness with a heightened degree of suspicion, threaten her with prison, conceptualize her as a potential criminal, and, with misplaced magnanimity, reassure her that she was not under arrest.

The court went on to describe the complainant's experience during the interview.[138] This description is revealing:

> There were occasions during her statement where the Complainant seemed to suggest that she did not want to continue. For example, she stated that she felt like she had to "relive this all over again. I don't want this. I don't know what to say ... I don't want to talk about it" ... It is clear ... she was extremely emotional and distraught about the incidents that she was relaying to Detective Carfantan and she found it extremely embarrassing to do so. She was speaking of extremely personal matters, such as having peed herself and bleeding from her vagina due to a bite mark, and clearly found it humiliating to relay these to a stranger. She was crying and sobbing at different times, once for a prolonged period of over two minutes when she was the only person in the interview room. In my view, the Complainant voluntarily provided the statement and it was only in the context of her embarrassment and emotional pain that she did not "want to talk about it."[139]

While it is not possible to know why the complainant, in this case, disappeared before trial, and fear of testifying against such a violent abuser is a very plausible barrier, given her experience reporting to the police, it would be unsurprising to discover that this initial encounter with them also adversely impacted her ongoing voluntary participation in the process. Perhaps the complainant was not available for cross-examination at trial—considered the most important aspect of procedural reliability in assessing the substantive admissibility of hearsay[140]—in part because of

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137 *Ibid* at para 37.

138 *Ibid* at paras 16–20.

139 *Ibid* at para 20.

140 *Bradshaw*, *supra* note 39 at paras 28, 87, 123.

her experience providing this *KGB* statement? Perhaps this "extremely emotional and distraught" woman who, before being asked to discuss "extremely embarrassing," "extremely personal" matters with "stranger[s]," was threatened by these strangers that if she "intentional[ly] mis[led]" them or caused "any interference" in their investigation she could spend "up to 14 years in jail,"[141] decided based on this experience that the criminal justice process was not going to be a helpful one for her.

If this experience did cause, contribute to, or solidify her decision to absent herself from the process, it reveals how counterproductive this interview technique is in many sexual violence cases. Contributing to a sexual assault survivor's decision to retreat from the criminal justice system by attempting to secure procedural reliability through the severe warning encapsulated in the *KGB* caution is an inane proposition: it creates the need to attempt to admit her statement while at the same time losing the opportunity to cross-examine her on it—which, again, is considered the most important variable in terms of procedural reliability.

To admit the complainant's police interview to prove the truth of its contents in this case, the court considered not only its procedural reliability but also its substantive reliability, particularly given that she was unavailable for cross-examination.[142] Indeed, as is true of other cases, the substantive admissibility of the complainant's statement was premised on a number of factors, including not only its procedural reliability but also its substantive reliability. Provided the statement was videotaped and taken under oath and affirmation, as it was, it is impossible to imagine, based on the evidentiary record and the case law, that the Court would have excluded it simply because the police also refused to treat this bleeding, bruised, and bitten woman like an accomplice to her own abuse by threatening her with prison when the statement was taken. If this assumption is wrong, then there is a deformation in the hearsay case law that needs to be corrected by appellate courts.

It is unconscionable for our criminal justice system to treat victims of brutal violence in this manner. That legal actors, whether that be the

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141 *Nepoose*, *supra* note 131 at paras 17, 20.

142 *Ibid* at paras 12, 21, 23–38.

police, Crown, or courts, have lost sight of the intended purpose of the *KGB* protocol to such an extent that the perversity of its application in a circumstance like this is not obvious to them does not make it less unconscionable.

C. *Cases in Which It Was Justifiable for the Police to "*KGB*" a Sexual Assault Complainant*

The third category of cases are those in which it is justifiable for the police to employ the *KGB* procedure because there is some indication that the complainant or her evidence will become unavailable. The Crown may proceed despite this, and the complainant should be treated with a heightened degree of suspicion because she has a history of fabricating evidence or is implicated in the offence being investigated. The most frequent context in which this will arise is in sexual offence cases involving human trafficking.

The circumstances in *R. v. K.P.* provide a good example. The accused was charged with numerous human trafficking, assault, and sexual assault offences related to two women: SD and KW.[143] One of the complainants, KW, had been in an ongoing relationship with the accused for a number of years. The police became involved when KW ran into the street in bare feet, with visible injuries, and told a passing motorist that she had escaped a townhouse where she was being forcibly confined by the accused and SD and compelled to sell sexual services. SD was arrested and charged with forcible confinement. She gave three statements to the police, the third of which was a *KGB* statement. SD told the police that she worked in the sex trade under the direction of the accused; that she turned all of the proceeds of this sex work over to him; that he assaulted her on numerous occasions; and that he beat KW when he suspected she was stealing from him. She also admitted to helping him restrain KW. After providing the *KGB* statement, the charges of forcible confinement against her were dropped. Before trial, SD disappeared and could not be located. KW remained in a relationship with the accused and testified at trial that she still loved him.[144]

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143 *R v KP*, 2022 ONSC 7114 at para 1.

144 *Ibid* at paras 52, 69.

The police were justified in imposing the full-*KGB* procedure on SD. There were indicia that either of these witnesses or their evidence could become unavailable—indeed this is what actually occurred with SD. The nature and severity of the allegations, the vulnerability of the complainants, the existence of multiple complainants, and the likelihood of pressure to recant made this a case in which the Crown would be likely to proceed even if a complainant or their evidence was no longer available—this is also what occurred. And finally, the police were warranted in approaching SD's interview with a heightened degree of skepticism. KW alleged that SD was involved in forcibly confining her in the townhouse for months.[145]

III. JUDGES MUST PROVIDE DIRECTION TO POLICE ON THE PROPER USE OF THE *KGB* PROTOCOL

The *KGB* procedure and the legal threshold for the substantive admission of police statements are the product of common law. Albeit not the intended impact of the majority's decision in *KGB*, it is the courts that created a legal process that has resulted in sexual assault complainants being discriminatorily confronted with this police practice, and it is the courts that must now mitigate this problem.

Courts play a fundamentally important supervisory role regarding the extraordinary powers we grant police through law. This observation applies not only with respect to police treatment of accused individuals but also their interactions with alleged victims. Courts are often said to be in dialogue with lawmakers, including in the context of sexual assault law.[146] But there is also an important discourse between the courts and the police.[147] Courts in Canada have not only failed to provide police with feedback and guidance on the futility and discriminatory harms of

145 *Ibid* at para 4.

146 See e.g. Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures (or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35:1 *Osgoode Hall LJ* 75 at 103–04; Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "*Charter* Dialogue Revisited—or 'Much Ado About Metaphors'" (2007) 45:1 *Osgoode Hall LJ* 1 at 19–21.

147 See e.g. Toronto Police Service, "Toronto Police Chief Asks OPP for Independent Review and Orders Internal Review of Plainclothes Procedures", *Blue Line* (22 April 2024), online: <blueline.ca> [perma.cc/5MDY-9JFY].

imposing the *KGB* protocol on most sexual assault complainants, but have perpetuated the problem through imprecision in the judicial language used in related case law.

Reported sexual assault decisions do not include comments from courts challenging or even questioning this practice.[148] In fact, when judges do comment directly on the police decision to use the *KGB* procedure on sexual assault complainants, the comments can be deeply problematic.

R. v. MacLeod (*MacLeod*) involved an allegation of sexual assault by a woman, PO, against her fifty-eight-year-old neighbour.[149] She and her partner, teenage children, and their friends had been having a fire in their backyard. The accused joined the gathering. The complainant alleged that after a period of time, her children and partner went inside, and it was only her and MacLeod left at the fire pit. She testified that she drank seven glasses of vodka over the course of the evening and that at some point awoke near the fire with the accused on top of her and his penis inside of her. She testified that she told the accused "no" and tried to push him away. Her evidence was that when she looked up, her son was standing over them with a light.[150]

The police were called. The evidence of the officer who responded was that the complainant was severely intoxicated, too drunk to communicate, had glossy, bloodshot eyes, a strong smell of alcohol emitting from her breath, and required assistance to walk. Oddly, despite this evidence, the officer appears to have taken a statement from her, using the *KGB* protocol, an hour later.[151] He also took her to the hospital, where she was examined by a SANE. Her blood alcohol content at the time of the examination does not appear to have been part of the evidentiary record. Regardless, the SANE testified that the complainant had the capacity to give consent for her examination when it was conducted, close to three hours after she was found in the backyard by her children.[152]

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148 CanLII search conducted in May 2024.

149 2023 NSSC 119 at paras 1, 18 [*MacLeod*].

150 *Ibid* at paras 5–6.

151 *Ibid* at paras 15–16.

152 *Ibid* at para 4.

Justice Coady, of the Supreme Court of Nova Scotia, acquitted the accused. He stated that, "after considering all of the evidence, [he was] satisfied that P.O. consented to sexual relations with Robert MacLeod."[153] To be clear, Justice Coady did not find that he had a reasonable doubt; he found that she consented. He went so far as to say that accepting the accused's evidence, as he did, led to the "inescapable conclusion that P.O. instigated the sexual activity."[154] This was a very questionable assessment of the accused's evidence, given that MacLeod told the police he couldn't remember exactly how it occurred, that it was just something that happened, and that he testified at trial that it just happened.[155]

Regardless, Justice Coady based his finding regarding the complainant's lack of credibility, in part, on the fact that the Cape Breton Regional Police chose to use the *KGB* procedure when taking her statement. There were two issues in this case: (i) did the complainant lack the capacity to consent to the sexual activity that occurred, and/or (ii) did the Crown prove her lack of consent beyond a reasonable doubt? Justice Coady appears to have relied, in part, on the fact that the police chose to impose the *KGB* procedure on this complainant in deciding both the issue of capacity and the issue of consent.

Justice Coady speculated that the complainant may have intentionally attempted to appear more intoxicated than she actually was and then asserted that it was "troubling" and "noteworthy"—in terms of the complainant's evidence—that the police imposed a *KGB* protocol on her. He connected the police decision to use the *KGB* protocol to the issue of her capacity to consent, her level of intoxication, and her credibility regarding her level of intoxication:

> It was apparent to this Court that P.O.'s recollection of events was either affected by alcohol *or an intention to appear intoxicated*.
>
> It is also noteworthy that when police took a statement from P.O. at 1:02 a.m. on August 9, 2020, they utilized a cautioned KGB statement. I find this factor troubling as it is not common practice to caution a sexual assault complainant prior to taking a

153 *Ibid* at para 26.

154 *Ibid* at para 27.

155 *Ibid* at para 17.

> statement. The evidence did not disclose a reason for this approach.[156]

Justice Coady also used the police decision to use the *KGB* procedure to discredit her claim that she did not consent to the sexual acts:

> There are a number of other factors that support the fact that the Crown has not proven lack of consent beyond a reasonable doubt. They are as follows ...
>
> KGB Statement: This Court is very familiar with these cautioned statements and their purpose. Yet when the police took a statement from P.O., they used this investigative technique. This is most unusual when taking a statement from a sexual assault complainant.[157]

Whether it happens relatively frequently, infrequently, or is "most unusual," as Justice Coady asserts, is unknown. We can surmise, as explained in Part I, that it is vastly more common to impose the *KGB* protocol upon this category of complainants than on victims of other types of criminal offences.

More importantly, PO had no control over the police's decision to use the *KGB* protocol on her. As Justice Coady notes, the evidentiary record disclosed no basis for this decision by the police. It was an error of law and deeply unjust for him to draw adverse inferences regarding the complainant's credibility on the basis of his own speculation as to why the police subjected her to the *KGB* protocol. Without offering any explanation or justification, he reasoned that the police would only do this if they thought she was lying, and from this he concluded that she was lying. This was profoundly unfair.

If we are to speculate about police motivations for using the *KGB* procedure, as Justice Coady erroneously did at trial, the more compelling supposition, given that there was no suggestion she had a motive to lie—other than that based on the discriminatory stereotype that women often have consensual sex that they regret and cry rape afterwards—may be that the police approached this witness with a heightened degree of distrust and skepticism because she was a woman alleging sexual assault.

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156 *Ibid* at para 10 [emphasis added].

157 *Ibid* at para 28.

It is incumbent upon judges to clarify for the police, in strong and certain language, the circumstances in which it is appropriate and just to impose the *KGB* protocol. It is incumbent on courts to admonish the police when they lose sight of what the Supreme Court intended in *KGB*. Far from meeting this responsibility, Justice Coady's reasoning in *MacLeod* discredited a sexual assault complainant on the basis of what appears to be a discriminatory application of the *KGB* procedure by the police, compounding the gender-based inequality in this case.

While there do not appear to be any reported decisions admonishing police for the inappropriate use of the *KGB* procedure, the court in *R. v. H.(S.)* (*HS*) did reproach the police for *failing* to administer an oath and threaten an emotionally distressed fifteen-year-old complainant.[158] In *HS*, the complainant's mother called the police to their home after her daughter disclosed sexual abuse perpetrated against her by her uncle when she was thirteen years old. According to Justice Marin, when she reported to the police, "she was very upset and very concerned about the impact of her complaint upon family members. She talked about 'it' ruining the family."[159] She gave a second statement at the police station. Neither statement was under oath or affirmation, nor was she cautioned about lying. At the preliminary inquiry, the complainant was visibly upset and crying, and she recanted. The Crown brought an application to admit her police statement to prove its substance. In adjudicating this application, Justice Marin commented: "No explanation was advanced to explain the failure to administer an oath, affirmation or warning."[160] He went on to add: "[T]he best way of ensuring the reliability of any statement obtained from the complainant was simply not addressed by the police officers responsible for investigating this complaint. In my opinion, this failure cannot be condoned."[161] Comments like this from courts are harmful. Surely the complainant's highly distressed emotional state, young age, and character constituted an "explanation" for the police's decision not to put her through the *KGB* procedure. Of note, Justice Marin admitted her police statement to prove its substance despite these procedural attributes.

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158 1998 CanLII 31296 at paras 24, 27 (ONCJ).

159 *Ibid* at para 27.

160 *Ibid* at para 24.

161 *Ibid.*

One final point on the failure of courts in this context: Judges should use more precise language to refer to the complainant's police statement in their sexual assault decisions. Courts should describe them as "videotaped statements," "videotaped/sworn statements," or "videotaped/sworn and cautioned statements," as appropriate. This will help to set a new norm that properly delineates between these categories for other legal actors. Courts should stop referring to sexual assault complainants' police statements as "*KGB* statements" or at a minimum, only use this term when it accurately reflects the protocol followed by the police. If courts are using the term "*KGB* statement" to refer to a sexual assault complainant's statement, regardless of the interview approach followed, and simply because the statement is from a *sexual assault* complainant, this too is discriminatory.

CONCLUSION

The Supreme Court of Canada did not intend the *KGB* procedure for women reporting sexual assaults to the police, and, in most cases, it is useless for the police to impose it upon them. The types of sexual offence cases in which its use is appropriate, justified, and of some potential utility for the police to impose this procedure are discrete, often identifiable in advance of the interview, and rare. While interviews with all witnesses should be videotaped, sexual assault complainants should not be treated differently because of the nature of the offence they allege. Their statements should only be taken under oath or solemn affirmation if, as would be the case for other witnesses, there is reason to believe their evidence will become unavailable at trial. Sexual assault complainants should only be subjected to the warning or caution contemplated in *KGB* if they fit within the category of untrustworthy witnesses identified by Chief Justice Lamer in that case.

Treating complainants as at a heightened risk of dishonesty simply because the nature of their allegation is one of sexualized violence or gender-based harm is discriminatory. Indeed, it is difficult to conjure a more explicit manifestation of victim blaming through the application of law than what occurs when the police, seemingly with the grace of the Crown and the courts, approach sexual assault complainants as coaccused in, or accomplices to, the sexual violence they allege.